TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 404

THE PEOPLE OF THE STATE OF NEW YORK EX REL. ANNIE COHN, APPELLANT,

vs.

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED SEPTEMBER 28, 1936.

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IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

NOTICE OF APPLICATION FOR A WRIT OF CERTIORARI

SIRS:

Please Take Notice that upon the annexed petition of Annie Cohn, verified the 20th day of August, 1935, an application will be made on her behalf at a Special Term of the Supreme Court of the State of New York, in and for the County of Albany, on the 30th day of August, 1935, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a writ of certiorari directed to Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, as prayed in said petition and for such other and further order or relief as may be proper.

Dated, N. Y., August 20th, 1935.

Yours, etc., Cohn & Cohn, Attorneys for Applicant, Office and P. O. Address, 2 Rector Street; Borough of Manhattan, City of New York.

To Mark Graves, John J. Merrill, John P. Hennessey, As Commissioners constituting the State Tax Commission of the State of New York.

[fol. 3] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

PETITION FOR AN ORDER THAT A WRIT OF CERTIORARI ISSUE

The petition of Annie Cohn respectfully shows:

First. At all the times hereinafter mentioned, the petitioner was and still is a widow, and resided in the City, County and State of New York, except since the Fall of 1933, petitioner has been and now is a resident of the City of Paterson, in the County of Passaic and State of New Jersey.

Second. Respondents are the Commissioners constituting the State Tax Commission of the State of New York.

Third. In April, 1932, and in April, 1933, petitioner duly made personal income tax returns for the years 1931 and 1932, respectively, pursuant to the Tax Law of New York and Section 367 thereof, and paid to the State Tax Commission the amounts of tax payable as the same appeared from the face of such returns, to wit: $792.89 and $606.80, respectively.

Fourth. On or about April 12th, 1934, petitioner duly made application pursuant to Article 574 of the Tax Law, sworn to on said date, for refunds of said taxes as erroneously or illegally collected, by forwarding to and filing with the New York State Income Tax Bureau, State Office [fol. 4] Building, Albany, New York, claims for refund, on form 110, on or about said date and within two years from the time of the filing of the aforesaid income tax returns for the years 1931 and 1932. Petitioner's canceled checks for the taxes paid accompanied said application. On or about July 24th, 1935, the State Tax Commission made its determination denying said application. Copies of said determination and of the letters written by said Tax Commission to petitioner in reference to said claims for refund, dated May 14th, 1934 and January 21st, 1935, are hereto annexed and marked Schedules "A", "B" and "C", respectively, also petitioner's claims for refund, marked Schedules "D" and "E".

Fifth. On February 10th, 1913, Marcus Cohn, the husband of petitioner, died testate, a resident of the City of Paterson, County of Passaic, State of New Jersey, devising and bequeathing to petitioner the entire net income from his estate for and during her widowhood. Said Will was duly probated in the Surrogate's Office of the County of Passaic, State of New Jersey, in February, 1913. Of the income reported by petitioner in said income tax return for the year 1931, $18,897.39 was rents from testator's real estate situate in Paterson, New Jersey, and $8,057.08 was interest from testator's real estate mortgages on property in Paterson, New Jersey, the bonds and mortgages also being physically located in Paterson, New Jersey; of the income reported by petitioner in said income tax return for the year 1932, $16,213.65 was rents from testator's real [fol. 5] estate situated in the City of Paterson, New Jersey, and $7,615.50 was interest from testator's real estate mort-

gages on property in Paterson, New Jersey, where the bonds and mortgages were also physically located.

Sixth. Petitioner is advised, and on information and belief alleges, that under the law of the State of New Jersey, a mortgage is an executed conveyance of land to secure a debt with a defeasance.

Seventh. Petitioner is advised, and on information and belief alleges, that the determination of the State Tax Commission, as aforesaid, is erroneous and that the income taxes paid by petitioner for the years 1931 and 1932 were erroneously and illegally collected, and that she is injured and ag-rieved thereby on the ground that her income, as aforesaid, was from rents and mortgage interest from real estate situate in the State of New Jersey and such income is not legally taxable by the State of New York and said tax would be, in substance and effect, a tax upon real estate and tangible property situated outside the State of New York and would violate petitioner's rights under the Constitution and laws of the State of New York and under the Constitution of the United States and the fourteenth amendment thereof.

Eighth. On or about October 25th, 1934, petitioner received a check from the State Tax Commission refunding $25.24, an overpayment made by petitioner in her return for the year 1932.

[fol. 6] No previous application for the writ sought herein has been made to any Court or Judge.

Wherefore, the petitioner prays that the said determination of the State Tax Commission may be reviewed and that said payments for the years 1931 and 1932 be declared to have been erroneously or illegally collected, and that said payments less $25.24 be refunded, and that a writ of certiorari may issue out of this Court to the respondents as Commissioners constituting the State Tax Commission of the State of New York, ordering them to make return to said writ pursuant to law and that the petitioner may have such other and further order or relief as may be proper.

Dated, New York, August 20th, 1935.

Annie Cohn, Petitioner. Cohn & Cohn, Attorneys for Petitioner, Office and P. O. Address, 2 Rector Street, Borough of Manhattan, City of New York, N. Y.

[fol. 7] SCHEDULE "A", ANNEXED TO FOREGOING PETITION

(Letterhead of Department of Taxation and Finance)

Albany

Jul. 24, 1935.

Cohn & Cohn, 2 Rector St., New York City.

Re 1931 and 1932 Claims for Refund, Filed in Behalf of Annie Cohn

GENTLEMEN:

This will acknowledge receipt of your letter of July 8, 1935 in further reference to the above matter.

You are advised in answer to your inquiry at the recent session of the Legislature of New York State, Section 359 Subdivision 1 of the Tax Law was amended by Chapter 933 of the Laws of 1935, retroactive to 1919 and subsequent years, under which it is provided the rental income derived by a resident of New York State from real property located without the State of New York constitutes taxable income. Under the above amendment to Section 359, the rental income derived by the taxpayer from sources outside of New York State constitutes taxable income in both the years 1931 and 1932.

The refund claims as filed are, therefore, respectfully denied and the file for 1931 and 1932 closed under this date.

Very truly yours, State Tax Commission, by Roy H. Palmer, Assistant Director, Chief-Audit Division, Income Tax Bureau.

FJM:EXB.

[fol. 8] SCHEDULE "B", ANNEXED TO FOREGOING PETITION

(Letterhead of Department of Taxation and Finance)

Albany

May 14, 1934.

Cohn & Cohn, 2 Rector Street, New York City.

Re Claims for Refund 1920 to 1932 Annie Cohn

GENTLEMEN:

This will acknowledge receipt of your letter dated April 17th with claims for refund for Annie Cohn for the period

from 1920 to 1930 as well as claims for refund filed on April 12th for the years 1931 and 1932.

Under the Tax Law and Regulations claims for refund must be filed within two years from the date of filing a return or adjustments made on or within three years. The claims for the period from 1929 to 1930 are, therefore, respectfully denied.

The claims for the years 1931 to 1932 will be held in abeyance pending a final determination in the case of Pierson vs. Lynch which is to be carried to the United States Supreme Court.

Very truly yours, State Tax Commission, by Roy H. Palmer, Assistant Director, Chief-Audit Division, Income Tax Bureau.

GPK:MC.

[fol. 9] SCHEDULE "C", ANNEXED TO FOREGOING PETITION

(Letterhead of Department of Taxation and Finance)

Albany

Jan. 21, 1935.

Colin & Cohn, 2 Rector Street, New York City.

Re Claims for Refund Annie Cohn, 1931 and 1932

GENTLEMEN:

Acknowledgment is made of the receipt of your communication under date of January 11th, in further reference to the above matter.

You are advised that the Tax Commission has not as yet had sufficient time to determine the full effect of the decision in the Pierson Case as affecting other taxpayers who did not join in the action. The matter is now being considered and at such time as the question is definitely decided any adjustment of the returns of the taxpayer which may be required will be made.

Very truly yours, State Tax Commission, by Roy H. Palmer, Assistant Director, Chief-Audit Division, Income Tax Bureau.

FJM/MMcK.

[fol. 10] SCHEDULE "D", ANNEXED TO FOREGOING PETITION

Claim for Refund

Income Taxes Erroneously Paid or Illegally Collected

This claim should be forwarded to New York State Income Tax Bureau, State Office Building, Albany, N. Y.

Year 1931.

STATE OF NEW JERSEY,
County of Passaic, ss:

Print Name of Claimant COHN, ANNIE.
Address: 555 East 27th Street, Paterson, N. J. formerly 235 West 102nd Street, New York, N. Y.

The deponent, being duly sworn, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete.

1. Year for which claim is made 1931.

2. Amount of Refund now claimed $792.89.

3. Amount of Tax paid $792.89.

Deponent verily believes that the amount stated in Item 2 should be refunded and now asks and demands refund of said amount for the following reasons: Pierson v. Lynch, 237 App. D. 763, 263 N. Y. S. 259, aff'd. by Court of Appeals, holds that rents received by a resident of New York [fol. 11] from real property in another state is not taxable as income in New York. Likewise under the decisions cited in said case, interest derived from mortgages in the State of New Jersey is not taxable as income in New York. Deponent's income for the year 1931 is as follows:

Interest received from Marcus Cohn Est., Paterson, N. J.	$10,013.43
Dividends from Marcus Cohn Est., Paterson, N. J.	11,636.56
Rents, less taxes $15,524.59 and Agents $500.00 from Paterson, N. J.	18,897.39
	$40,547.38

Deductions

Interest	$ 140.71	
Loss on Sale of Securities	12,714.53	
Luxury tax	150.00	
Contributions	220.00	
Exemption	2,500.00	
		15,725.04
Net Income		$24,822.34
Rents from real estate in Paterson, N. J.	$18,897.39	
Interest from real est. mtgs., Paterson, N. J.	8,057.08	26,954.34

Deponent paid $792.89 when she had no income subject to tax.

5. Deponent further alleges that no claim has heretofore been presented for the refunding of the whole or any part [fol. 12] of the amount stated in Item 2, and that no part has heretofore been refunded to claimant.

Annie Cohn.

Sworn to and subscribed before me this 12th day of April, 1934. Maurice Cohn, Master in Chancery in New Jersey.

SCHEDULE "E", ANNEXED TO FOREGOING PETITION

Claim for Refund

Income Taxes Erroneously Paid or Illegally Collected

This claim should be forwarded to New York State Income Tax Bureau, State Office Building, Albany, N. Y.

Year 1932.

STATE OF NEW JERSEY,
County of Passaic, ss:

Print Name of Claimant COHN, ANNIE.
Address: 555 East 27th Street, Paterson, N. J. Formerly 235 West 102nd Street, New York, N. Y.

The deponent, being duly sworn, deposes and says that this claim is made on behalf of the claimant named above,

[fol. 13] and that the facts stated below with reference to the claim are true and complete.

1. Year for which claim is made 1932.

2. Amount of Refund now claimed $606.80

3. Amount of Tax paid $606.80

Deponent verily believes that the amount stated in Item 2 should be refunded and now asks and demands refund of said amount for the following reasons: Pierson v. Lynch, 237 App. D. 763, 263 N. Y. S. 259, aff'd. by Court of Appeals, holds that rents received by a resident of New York from real property in another state is not taxable as income in New York. Likewise under the decisions cited in said case, interest derived from mortgages in the State of New Jersey is not taxable as income in New York. Deponent's income for the year 1932 is as follows:

Interest received from Marcus Cohn Est., Paterson, N. J.	$9,264.53
Dividends received from Marcus Cohn Est., Paterson, N. J.	6,842.42
Rents, less taxes $13,766.83 and agents $500.00 from Paterson, N. J.	16,213.65
	$32,320.60

[fol. 14] Deductions		
Interest	$118.12	
Loss on Sale of Securities	8,083.46	
Loss on Mortgages	1,800.00	
Luxury tax	150.00	
Contributions	134.00	
Exemption	2,500.00	
		12,785.58
Net Income		$19,535.02
Rents from real estate in Paterson, N. J.	$16,213.65	
Interest from real estate mtgs., Paterson	7,615.50	23,829.15

Deponent paid $606.80 when she had no income subject to tax.

5. Deponent further alleges that no claim has heretofore been presented for the refunding of the whole or any part

of the amount stated in Item 2, and that no part has heretofore been refunded to claimant.

Annie Cohn.

Sworn to and subscribed before me this 12th day of April, 1934. Maurice Cohn, Master in Chancery of New Jersey.

(Verified by Annie Cohn, August 20, 1935.)

[fol. 15] STATE OF NEW YORK:

THE STATE TAX COMMISSION

In the Matter of Claims for Refund and Application for Revision of the Personal Income Taxes of ANNIE COHN for the Years 1931 and 1932

DETERMINATION

Returns of income on behalf of the above named taxpayer for the calendar years 1931 and 1932 having been duly filed at the times when required by statute in accordance with the provisions of article 16 of the Tax Law, and taxes in the amounts of $792.89 having been paid for the year 1931 and $606.80 for the year 1932; and the return for 1932 having been duly audited, a refund was duly granted to the taxpayer in the amount of $25.24 on the 2nd day of October, 1934, which refund was mailed to the taxpayer in usual course thereby reducing the amount paid for the year 1932 to $581.56; and the taxpayer on or about April 13th, 1934 having filed claims for refund for the total of amounts of the taxes paid in each of said years 1931 and 1932, which claims were received and accepted as applications for revision under section 374 of the Tax Law; and the facts having been stipulated by the taxpayer with this Commission and the formal hearing having been waived; and it appearing that only questions of law are [fol. 16] involved, and the taxpayer through her attorneys, Cohn & Cohn, No. 2 Rector Street, New York City, Maurice Cohn, of counsel having presented verbal argument thereon, and such questions of law having been duly considered by the Commission, it is

Determined: That the computation of the tax as set forth in taxpayer's return for 1931 was correct and in accordance with the law, and that the tax as computed in the taxpayer's return for 1932 after adjustment upon audit and refund made in the amount of $25.24 was correct, and that the taxes thus paid by the taxpayer for said years were due and payable, and did not include any taxes or other charges which should not have been lawfully demanded, and that no payment has been illegally made or exacted thereupon; and that the taxpayer is not entitled to any further resettlement of the tax nor to the refunds claimed.

Dated, Albany, N. Y., September 12th, 1935.

The State Tax Commission, (Signed) Mark Graves, Commissioner. (Signed) John P. Hennessey, Commissioner.

[fol. 17] In Supreme Court of New York, Albany County

Order that Writ of Certiorari Issue—August 30, 1935

On reading and filing the petition of Annie Cohn, verified the 20th day of August, 1935, and the notice of application for an order for a Writ of Certiorari, dated August 20th, 1935, with proof of due service thereof, and the stipulation and statement of facts dated September 16, 1935, and it appearing that said Annie Cohn has paid to the State Tax Commission the full amounts of taxes for the years 1931 and 1932, as the same appeared from the face of the returns filed by her for said years, and on motion of Cohn & Cohn, attorneys for the petitioner, it is

Ordered, that a Writ of Certiorari do issue from and out of this Court directed to Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, to review the decision and determination of the said State Tax Commission mentioned and described in the petition and the questions involving the merits therein mentioned, which Writ shall be returnable at the office of the Clerk of the County of Albany within twenty (20) days after service

thereof upon the said State Tax Commission of the State of New York.

Enter.

Sidney F. Foster, Justice of the Supreme Court of the State of New York.

[fol. 18] In Supreme Court of New York, Albany County

Writ of Certiorari

Whereas, we have been informed by the petition of Annie Cohn, verified the 20th day of August, 1935, that certain proceedings have been had before the State Tax Commission of the State of New York, upon the application made on her behalf on or about April 12th, 1934, for refunds of $792.89 and $606.80 (less $25.24), personal income tax payments made by her to the State Tax Commission for the years 1931 and 1932, respectively, as set forth in said petition, and that the State Tax Commission made its determination, dated July 24th, 1935, denying the same, the said Annie Cohn having now made an application to the Court for a Writ of Certiorari to review said decision and determination of said State Tax Commission, and we, being willing for certain purposes to be certified of such proceeding, do hereby command and strictly enjoin Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, that they certify and return the accounts and all the evidence before them upon the application of said Annie Cohn for refunds of said payments for personal income taxes made by her for the years 1931 and 1932, and all the evidence, documents, reports, records and papers relating thereto at the office of the Clerk of the County of Albany, within twenty (20) days after the serv-
[fol. 19] ice upon them of this Writ, pursuant to the provisions of the Tax Law and other requirements of law, so that our Supreme Court may further cause to be done therein what of right and according to law ought to be done and let the respondents have then and there this Writ.

Witness, the Hon. Sidney F. Foster, Justice of this Honorable Court, at the Courthouse in the City of Albany, New York, this 18th day of September, 1935.

John A. Knox, Clerk.

Cohn & Cohn, Attorneys for Relator, Office and P. O. Address, 2 Rector Street, Borough of Manhattan, City of New York, N. Y.

This Writ is hereby allowed this 18th day of September, 1935.

Sidney F. Foster, Justice of the Supreme Court of the State of New York.

[fol. 20] In Supreme Court of New York, Albany County

Stipulation and Statement of Facts

It is hereby stipulated and agreed by and between the parties above named that the hearing provided for in Section 374, Article 16 of the Tax Law, is hereby waived; that said parties agree that the subjoined statement of facts shall be in lieu of such hearing; and that the petition filed herein be amended by adding the following allegation:

"Ninth. Petitioner has duly filed an undertaking for costs and charges approved by a Justice of the Supreme Court in compliance with the provisions of Section 375 of the Tax Law."

It Is Further Stipulated and Agreed that the prayer of the petition be amended to add, after the words "and that said payments less $25.24 be refunded", the words "with interest from dates of payment".

Statement of Facts

1. During the years 1931 and 1932, Annie Cohn, the taxpayer and the relator, was a widow and resided in the Borough of Manhattan, City, County and State of New York. The respondents are the Commissioners constituting the State Tax Commission of the State of New York.

[fol. 21] 2. In April, 1932, and in April, 1933, said taxpayer duly made personal income tax returns for the years 1931 and 1932, respectively, pursuant to the Tax Law of New York and Section 367 thereof, and paid to the State Tax Commission the amounts of tax payable as the same appeared from the face of such returns, to wit: $792.89 and

$606.80, respectively. That on October 2, 1934, taxpayer was granted a refund in the amount of $25.24, thereby reducing the amount paid for the year 1932 to $581.56.

3. Contemporaneously with said returns, said taxpayer, as Executrix of the Estate of Marcus Cohn, deceased, a non-resident estate, duly filed information returns with the State Tax Commission. Said returns filed by Annie Cohn, individually and as Executrix of said estate, are made part hereof.

4. On or about April 12th, 1934, said taxpayer duly made application pursuant to Article 16 of the Tax Law and to Article 574 of the Personal Income Tax Regulations, sworn to April 12th, 1934, for refunds of said taxes as erroneously or illegally collected, by forwarding to and filing with the New York State Income Tax Bureau, State Office Building, Albany, New York, claims for refund on form 110, on or about said date and within two years from the time of the filing of the aforesaid income tax returns for the years 1931 and 1932. Said taxpayer's canceled checks for the taxes paid accompanied said application. Said applications for refund are hereby made part of this statement of facts.

[fol. 22] 5. On or about July 24, 1935, the State Tax Commission made its informal determination denying said application. On or about September 12th, 1935 the State Tax Commission made its final determination denying said application, to review which it is hereby consented that a certiorari order herein may be granted. Taxpayer's claims for refund are made part hereof.

6. On the 10th day of February, 1913, Marcus Cohn, the husband of the taxpayer, died testate, a resident of the City of Paterson, in the County of Passaic and State of New Jersey, devising and bequeathing to said taxpayer the entire net income from his estate (after certain minor bequests) for and during her widowhood. Said Will was duly probated in the Surrogate's office of the County of Passaic, State of New Jersey, in February, 1913. A copy of said Will is attached hereto and made a part hereof. The estate of Marcus Cohn, deceased, has always been administered in the State of New Jersey. The executors thereof were David Cohn, Maurice Cohn and the said Annie Cohn, to

whom letters testamentary were duly issued by the Surrogate of Passaic County in the State of New Jersey, in February 1913, since which time said executors have acted as such. The said David Cohn and Maurice Cohn were residents of the State of New Jersey during the years 1931 and 1932.

7. Of the income reported by the taxpayer in said income tax return for the year 1931, $18,897.39 was rents from testator's real estate situated in Patterson, New Jersey, and $8,057.08 was interest from testator's real estate mort-
[fol. 23] gages on property in Paterson, New Jersey, the bond and mortgages having always been physically located in Paterson, New Jersey. The said bonds and mortgages, the amounts thereof, the rate of interest and location of property are as follows:

	Interest
Webster bond and mortgage $125,000.—interest at 6%—premises 124 Main Street, Paterson, New Jersey	$7,500.00
Schenker bond and mortgage—$7,000.—interest at 6%—premises 365 20th Avenue, Paterson, New Jersey	326.25
Pirozzi bond and mortgage—$....—interest at 6%—premises 946 East 25th Street, Paterson, New Jersey	94.50
Pappas bond and mortgage—$....—interest at 6%—premises 950 East 25th Street, Paterson, New Jersey	27.00
Laskaris bond and mortgage—$....—interest at 6%—premises 922 East 23rd Street, Paterson, New Jersey	61.50
Cohen bond and mortgage—$....—interest at 6%—premises 108 Fair Street, Paterson, New Jersey	47.83
	$8,057.08

8. The amounts of the last four bond and mortgages are not stated because of the fact that they were mortgages which were amortized annually or semi-annually. The rent reported, $18,897.39, was received from the following prop-
[fol. 24] erties: 330 Main Street, 201 Main Street and 421 Main Street, Paterson, New Jersey. All of the items as

to said rents were specifically set forth in the information returns of Annie Cohn, as Executrix, filed by her for the years 1931 and 1932.

9. Of the income reported by the taxpayer in said income tax return for the year 1932, $16,213.65 was rents from testator's real estate situated in the City of Paterson, New Jersey, and $7,615.50 was interest from testator's mortgages on property in Paterson, New Jersey, where the bonds and mortgages were always physically located. The said bonds and mortgages, the amounts thereof, the rate of interest and location of property are as follows:

	Interest
Webster bond and mortgage—$125,000.—interest at 6%—premises 124 Main Street, Paterson, New Jersey	$7,500.00
Pirozzi bond and mortgage—$....—interest at 6%—premises 946 East 25th Street, Paterson, New Jersey	22.50
Pappas bond and mortgage—$....—interest at 6%—premises 950 East 25th Street, Paterson, New Jersey	9.00
Laskaris bond and mortgage—$....—interest at 6%—premises 922 East 23rd Street, Paterson, New Jersey	39.00
Cohen bond and mortgage—$....—interest at 6%—premises 108 Fair Street, Paterson, New Jersey	45.00
	$7,615.50

[fol. 25] 10. As indicated in the information returns of the said Annie Cohn, as Executrix, the office of the estate of Marcus Cohn, deceased, since decedent's death in 1913, has always been at 112 Ellison Street, Paterson, New Jersey; and all bonds and mortgages and other securities of said estate have always been kept in the safe deposit box of said estate in the Paterson National Bank, in Paterson, New Jersey.

11. In June, 1932, it was discovered that an error had been made by the taxpayer in her 1931 individual and information tax returns in stating that a loss of $12,714.33 was sustained by her on the sale of securities belonging to the estate of Marcus Cohn, deceased. Said error was cor-

rected by said taxpayer in a letter to the State Tax Commission, dated June 17th, 1932, in which she set forth the fact that the error had been made and that the securities upon which said loss had been sustained belonged to her and not to the said estate.

Dated, Albany, N. Y., September 16, 1935.

Cohn & Cohn, Attorneys for Relator. John J. Bennett, Jr., Attorney General, Attorney for Respondents.

[fol. 26] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

RETURN OF STATE TAX COMMISSION

The respondents above named, obedient to an order and writ of certiorari granted herein by Mr. Justice Sidney F. Foster on the 30th day of August, 1935, hereby make return thereto consisting of all singular the proceedings, decisions and actions of the respondent State Tax Commission, had and made in the premises, together with the records in the proceedings had before them on the hearing in this matter, including the transcript of the testimony had before said Commission, as follows:

(1) New York State income tax resident return for calendar year 1931, filed by Annie Cohn.

(2) New York State income tax resident return for the calendar year 1932, filed by Annie Cohn.

(3) Voucher for income tax refund, amount $25.24, representing apparent overpayment of tax.

(4) Claim for refund made by Annie Cohn, verified April 12, 1934, year for which claim was made 1931; amount claimed $792.89.

(5) Claim for refund made by Annie Cohn, verified April 12, 1934; year for which claim was made 1932; amount claimed $606.80.

[fol. 27] (6) Stipulation and statement of facts, bearing date September 16, 1935, entered into between Cohn & Cohn, Esqs., attorneys for relator, and Hon. John J. Bennett, Jr., Attorney General, attorney for respondents.

(7) Determination of State Tax Commission, bearing date September 12, 1935.

Respondents deny each and every allegation contained in the petition herein, except in so far as the same is shown to be true by this return.

Respondents respectfully allege that the taxes imposed upon the relator herein were justly and legally imposed pursuant to the laws of the State of New York.

In Witness Whereof, the State Tax Commission hereunto sets its hands and seals this 3rd day of October, 1935.

State Tax Commission, by Mark Graves, John J. Merrill, John P. Hennessey.

[fol. 28] In Supreme Court of New York, Albany County

Stipulation as to Record

It is Hereby Stipulated and Agreed by and between the parties above named that the individual returns of the relator for the years 1931 and 1932, set forth in the return of the respondents, the State Tax Commission of the State of New York, the information returns of "Annie Cohn, Executrix of Marcus Cohn Estate, 112 Ellison Street, Paterson, N. J.", for the years 1931 and 1932, which were made a part of the Stipulation and Statement of Facts dated September 16th, 1935, and the Will of Marcus Cohn, deceased also made a part of said stipulation and Statement of Facts, be omitted from the printed case, in view of the fact that all of the essential statements thereof are set forth in the said Stipulation and Statement of Facts.

It is Further Stipulated and Agreed that the voucher for the income tax refund, $25.24, paid to the relator, and made a part of the said return, be omitted from the printed case; and that the letters, Schedules "A," "B" and "C" set forth in the relator's petition for Writ of Certiorari, be incorporated in the agreed Statement of Facts.

Dated, October 18th, 1935.

Cohn & Cohn, Attorneys for Relator. John J. Bennett, Jr., Attorney General, Attorney for Respondents.

[fols. 29-30] EXHIBIT 1

Letter of State Tax Commission to Cohn & Cohn, dated July 24, 1935.
(Printed as Schedule "A" attached to Petition at p. 7.)

EXHIBIT 2

Letter of State Tax Commission to Cohn & Cohn, dated May 14, 1934.
(Printed as Schedule "B" attached to Petition at p. 8.)

EXHIBIT 3

Letter of State Tax Commission to Cohn & Cohn, dated January 21, 1935.
(Printed as Schedule "C" attached to Petition at p. 9.)

EXHIBIT 4

Claim for Refund for year 1931.
(Printed as Schedule "D" attached to Petition at pp. 10-12.)

EXHIBIT 5

Claim for Refund for year 1932.
(Printed as Schedule "E" attached to Petition at pp. 12-14.)

[fol. 31] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present: Honorable James P. Hill, Presiding Justice; Honorable Leon C. Rhodes, Honorable John C. Crapser, Honorable F. Walter Bliss, Honorable Christopher J. Heffernan, Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK Upon the Relation of ANNIE COHN, Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents.

ORDER OF ANNULMENT

The relator, Annie Cohn, having applied to this Court for the review by certiorari of a determination of the State Tax Commission denying the application of said relator for refunds of income taxes for the years 1931 and 1932 in the amounts of Seven hundred ninety-two and 89/100 ($792.89) [fol. 32] Dollars and Five hundred eighty-one and 56/100 ($581.56) Dollars, respectively, as erroneously paid and illegally collected, the said amounts representing the tax on rents derived by the relator from lands or interest in lands and from investments with a situs in the State of New Jersey, and the said proceeding having duly come on to be heard at the Term of this Court, commencing on the 14th day of January, 1936, and after hearing Maurice Cohn, of counsel for said relator, in support of said application, and Joseph M. Mesnig, of counsel for the respondents, in opposition thereto, and due deliberation having been had, it is hereby

Ordered, adjudged and decreed that the determination of the State Tax Commission be and the same hereby is annulled, Mr. Justice Leon C. Rhodes dissenting and voting to confirm, and that relator recover Fifty ($50.00) Dollars costs and her disbursements in this proceeding, and that said relator have execution therefor.

John S. Herrick, Clerk.

[fol. 33] In Supreme Court of New York, Appellate Division, Third Judicial Department

Decision Handed Down —— —, ——

48-22

The People of the State of New York ex Rel. Annie Cohn, Relator,

v.

Mark Graves and Others, as Commissioners, Constituting The State Tax Commission of the State of New York, Respondents

Decision

Determination annulled, with fifty dollars costs and disbursements.

Opinion by Hill, P. J.

Crapser, Bliss and Heffernan, JJ., concur.

Rhodes, J., dissents and votes to confirm.

[fol. 34] 48/22

In Supreme Court of New York, Appellate Division, Third Department

The People of the State of New York upon the Relation of Annie Cohn, Relator,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

Argued, January Term, 1936. Decided —— —, 1936

Hill, P. J., Rhodes, Crapser, Bliss, Heffernan, A. JJ.

Review of determination of the State Tax Commission under a Writ of Certiorari.

Cohn & Cohn, attorneys for relator, (Maurice Cohn, of counsel) New York City.

John J. Bennett, Jr., Attorney General, Attorney for Respondents (Joseph M. Mesnig, Assistant Attorney General, of counsel) Albany, N. Y.

OPINION TO ANNUL

HILL, P. J.:

The State Tax Commission has assessed an income tax against the relator, a resident of New York State, on account of rentals and income which she received from real [fol. 35] property situate in New Jersey. A petition for a refund made as prescribed in the Tax Law, has been denied by the Commission. That determination comes before our court for review under a writ of certiorari. The identical question now presented has been decided in this court, and adversely to the Commission's determination (Pierson v. Lynch, et al., 237 A. D. 763; affirmed without opinion, 263 N. Y. 533; writ of certiorari dismissed as improvidently granted, 293 U. S. 52).

The fact that the statute which authorized the tax (§ 359, Tax Law) has been amended since the decision in the Pierson case is without significance, as we decided that case solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a state, irrespective of the wording of the statute, to tax a resident of the state on account of rentals or income received from land located beyond its borders. The 1935 amendment (Chap. 933, Laws 1935) only makes more definite and certain the meaning which we gave Section 359 in deciding the Pierson case, and does not detract from the force of that authority.

Further citation of authority may be cumulative, as the Pierson case is a direct authority, decided first in this court and unanimously affirmed without opinion in the Court of Appeals. However, as the Supreme Court of the United States, in a later case has re-applied the law as it had been settled earlier, and as it was applied in the Pierson case, a brief examination of the more recent case (Senior v. [fol. 36] Braden, et al., 295 U. S. 422) may be proper. There, "The Ohio General Code provided that all investments and other intangible property of persons residing within the state should be subject to taxation" (p. 427).

"Appellant owned transferable certificates showing that he was a beneficiary under seven separate declarations of trust, and entitled to stated portions of rents derived from specified parcels of land—some of them within Ohio and some without" (p. 428). The taxing officials threatened to assess the income which the appellant received upon these declarations of trust. He instituted a suit to restrain the collection of the tax upon the ground that the Ohio Statute was unconstitutional under the Fourteenth Amendment. The opinion states: "With commendable frankness, counsel admit that under the Fourteenth Amendment, the state has 'no power to tax land or interests in land situate beyond its borders;' * * * Consequently they say 'if the property of the appellant, which the appellees seek to tax in this case, is land or interest in land situate * * * without the state, their action is unconstitutional and should be permanently enjoined.'"

In the Senior case, there were four parcels of land outside Ohio to which separate declarations of trust applied. The attorney for the Ohio taxing officials recognized, as it was recognized by us in the Pierson case, that the law was settled, and conceded, inter alia, that the state had no power to tax land or interests in land situate beyond its borders. The court applied that rule. The opinion quite largely [fol. 37] dealt with the subject of whether the land trust certificates were interests in land. It was determined that they were, and the court restrained the enforcement of the tax upon the ground that the state had no power to tax land or interest in land situate beyond its borders, and that a tax upon the income from land was tantamount to a tax upon the land.

The determination should be annulled, with fifty dollars costs and disbursements.

IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please Take Notice that the above named Respondents hereby appeal to the Court of Appeals of the State of New

York from the final order of the Appellate Division of the State of New York, Third Judicial Department, entered in [fols. 38-39] the office of the Clerk of Albany County on or about the 14th day of March, 1936, which said final order annulled a determination of the State Tax Commission made herein on or about the 12th day of September, 1935, and the said Respondents appeal from each and every part of said order.

Dated, Albany, New York, March 20, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office & Post Office Address, The Capitol, Albany, N. Y.

To Cohn and Cohn, Esqs., Attorneys for Relator, 2 Rector Street, New York, N. Y. John A. Knox, Esq., County Clerk of Albany County, Court House, Albany, N. Y.

[fol. 40] In Court of Appeals of New York

The People of the State of New York upon the Relation of Annie Cohn, Relator-Respondent,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents-Appellants

Opinion—Filed September 22, 1936

Crane, Ch. J.:

Rents from real property located in New Jersey, as well as interest from mortgages on similar property is, in my opinion, taxable income when received by a resident of this State. The tax upon such income is not a tax on the New Jersey real estate. The Pollock case (Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429) has not decided otherwise and should not be pushed to cover this point. Many cases have gone through the courts since that decision explaining and clarifying its limitations. What may be a "direct" tax under the Federal Constitution may be income (as it really is) for other purposes.

The order of the Appellate Division should be reversed and the determination of the State Tax Commission affirmed, with costs in this court and in the Appellate Division. A question under the Federal Constitution was presented and necessarily passed upon by this court, viz.: Is section 359 of the Tax Law of the State of New York, as amended by chapter 933, Laws of 1935, in so far as it imposes an income tax upon rents received by a resident of [fol. 41] this State from real property located in a foreign State repugnant to, and violative of any provision of the Constitution of the United States. This court held the sections of said Tax Law herein involved to be a valid exercise of legislative power.

DISSENTING OPINION

HUBBS, J. (dissenting):

The relator, Annie Cohn, during the years 1931 and 1932, while a resident of this State, received, as the beneficiary of a life estate created by the will of her deceased husband, certain income, part of which was derived from rents from real estate located in the State of New Jersey and part from interest on bonds and mortgages upon real property located in that State. There were three executors of the will, two of whom resided in New Jersey and relator who resided in this State. The executors qualified in the State of New Jersey. Since 1913 they have been functioning in that State and the office of the estate is and always has been in the City of Paterson, where the securities are kept in a bank. The executors have managed the estate property, collected rents and income from bonds and mortgages, and made repairs to the real property.

The relator filed a State income tax return showing income received from the estate, consisting of rents from certain specified real properties located in New Jersey and interest on mortgages covering real property in that State. She paid an income tax on such income. Thereafter she made application for refund of the taxes paid, as erroneously paid or illegally collected, her contention being that this State was without power to tax either the rental income derived from real property located without the State or [fol. 42] the income from bonds and mortgages upon real property located without the State, where the situs of such

intangibles was likewise without the State. In making the application for refund, the appellant relied upon Matter of Pierson v. Lynch (237 App. Div., 763; affd. 263 N. Y. 533). The appeal in that case was dismissed by the United States Supreme Court.

The Legislature amended the Tax Law (Cons. Laws, ch. 60) by chapter 933 of the Laws of 1935, and provided that the rental income derived by a resident of New York State from real property located without the State constituted taxable income. The law was made retroactive to January 1, 1919.

The relator's claims for refund were denied. This proceeding was thereupon instituted. The Appellate Division decided that the identical question presented had been decided in Matter of Pierson v. Lynch (supra); that the fact that the statute which authorized the tax, Section 359 of the Tax Law, has been amended since the decision in the Pierson case is without significance as that case was decided solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a State to tax a resident of the State on account of rentals or income received from land located beyond its borders. Reference was also made to the determination of the Supreme Court of the United States in Senior v. Braden (295 U. S. 422).

Upon this appeal the State Tax Commission contends, despite the determination of this court in the Pierson case and despite the decision of the United States Supreme [fol. 43] Court in Pollock v. Farmers' Loan & Trust Co. (157 U. S. 429), which latter case held in effect that a tax upon the income from real property was the same in substance as a tax on the real property, that the rents and mortgage interest derived from real property located without the State received by a resident of this State are properly subject to the New York personal income tax law.

It would be impossible, without squarely receding from the position taken in the Pierson case, to hold that income represented by rentals from real property located in another State may be included as part of the owner's income for the purpose of computing the owner's income tax in this State. We believe that case was correctly decided. The only difference in the facts of the two cases is that in the Pierson case title to the real property appears to have been

in the recipient of the income in her individual name, whereas in the present case the recipient of the income had only a life interest in the property. This slight difference in the facts of the two cases is not urged as a ground for the application of a different rule and, of course, could not be urged as such a ground, since the question involved is based upon the broad ground of whether the income tax is such a tax as may not be imposed by one State upon real property and tangible personal property located in another. The argument of the Tax Commission is, in substance, that the decision in Matter of Pierson v. Lynch (supra) was based upon the decision of the Supreme Court of the United States in the Pollock case and that, as a matter of fact, the decision in the Pollock case has no bearing upon the point at issue here. The tax involved in the Pollock case was an annual tax levied by the Congress of the United States on the income of persons and corporations. It was decided that a tax on the rents or income of real estate is a direct [fol. 44] tax within the meaning of the Constitution of the United States which, by the third clause of Section 2, Article I, requires that direct taxes shall be apportioned among the several States and that since the income tax law under consideration did not provide apportionment of the tax collected and the tax was a direct tax, the act was in violation of the United States Constitution and to the extent that it levied a tax on the rents or income of real estate was invalid. The determination in the Pollock case has been repeatedly stated to have amounted to a holding upon the constitutional meaning of the word "direct"—that is, that a tax on income from real property amounts in effect to a direct tax upon the property (Knowlton v. Moore, 178 U. S. 41; Flint v. Stone Tracy Co., 220 U. S. 107; McCoach v. Minehill R'y, 228 U. S. 295).

In the Pollock case the question involved was as to the validity of the act of Congress as construed in the light of the Federal Constitution, whereas in the instant case we are concerned with the effect of a tax imposed by the State in view of the provision of the Federal Constitution. There seems to be nothing in the late decisions of the United States Supreme Court which detracts from the effect of its decision in the Pollock case that a tax upon the income from real property is a direct tax and equivalent to a tax upon the property itself.

In Senior v. Braden (supra) the State of Ohio taxed transferable certificates under declarations of trust entitling the holders to a portion of rents from specific parcels of real estate, some within the State of Ohio, some in other states. It was conceded that under the Fourteenth Amendment the State had no power to tax land or inter- [fol. 45] ests in land beyond its borders, and that if the certificates constituted interests in land, the tax would be unconstitutional and void. It was decided that a tax in Ohio on the certificates was void. It appeared that each parcel of land covered by the certificates was taxed in the State where located. In each the trustee held and managed the property for the use and benefit of the certificate holders and distributed the rents and proceeds of sales. Each certificate holder was said to hold a beneficial interest in the trust of each parcel, and the trustee was free from the control of the certificate holders. The state contended that the interest of a certificate holder was a species of intangible personal property entitling the holder to a pro rata distribution of income and proceeds of sales; that the certificate was the evidence of the holder's interest in land, legal title of which the trustee held. The court held the certificate holders had interests in and to the property which were more than a bare right and much more than a choice in action, citing and quoting from Brown v. Fletcher (235 U. S. 589). The dissenting opinion of Mr. Justice Stone indicates that he understood the prevailing opinion to hold that a State could not tax the income from real property located in another State. The court decided that the same rule applied under the State statute as under the United States statute, thereby extending the rule of the Pollock case and making it applicable under a State statute. Although that case did not involve an income tax statute, it did involve a tax under the investments measured by the income.

As land in another State cannot be taxed against the owner in this State, and a tax upon the income from real property is a tax upon the real property itself, it follows that the tax assessed in the case at bar on the rents received was illegal. It was also illegal as constituting double tax- [fol. 46] ation for the reasons hereinafter stated.

There remains the question as to whether the income from bonds and mortgages is likewise entitled to be ex-

empted from the application of the State income tax. In considering that question, it is to be borne in mind that the property upon which the mortgages exist is wholly without the State of New York, and, further, that the evidences of the indebtedness, that is, the bonds and mortgages, are likewise without the State. Furthermore, they are a part of an estate administered by the executors in a measure as a business in the State of New Jersey. The income results from the investment of funds of the estate, the supervision of those investments, and the activity of the executors in collecting the income. The court below seems to have treated the income from mortgages on the real property under the same category as rentals. That type of income was not involved in Matter of Pierson v. Lynch (supra). Mortgage interest is not compensation for the use of real property but rather compensation for the use of money. That is, it constitutes compensation for a loan of money or forbearance on an indebtedness. The debt is not tangible and the mortgage upon the real property is only collateral security for the intangible. If it were necessary to construe the decision in this case as a determination that a tax upon mortgage interest is a direct tax on the land, there would be difficulty in sustaining the decision in so far as that type of income is concerned. However, the courts have gone much further and have held that where intangible as well as tangible property has acquired a business situs in another State, taxation thereof by the State other than the State in which it had acquired a business situs would violate the due process clause of the Fourteenth Amendment of the United [fol. 47] States Constitution and constitute double taxation. In New Orleans v. Stempel, (175 U. S. 309) the defendant in error, domiciled in New York, was the owner of credits evidenced by notes largely secured by mortgages on real property in New Orleans. The notes and mortgages were in the City of New Orleans in the possession of an agent of the defendant in error. The agent collected the interest and principal as it became due and deposited the same in a bank in New Orleans. The question involved in that case was as to whether the property in the hands of the agent was subject to taxation in New Orleans. It was held that such taxation did not infringe any rights secured by the Federal Constitution. It was said that when an indebtedness has taken a concrete form and become evidenced by note, bill,

mortgage or other written instrument, and the written instrument evidencing the indebtedness is left within the State in the hands of an agent of the non-resident owner to be by the agent used for the collection and deposit or reinvestment within the State, its taxable situs is in the State (De Ganay v. Lederer, 250 U. S. 376.)

It seems to be quite clear that property, consisting of bonds, mortgages and similar evidences of indebtedness, is taxable in the State where they are physically located if they are there, as in this case, for the purpose of collection of principal and interest and for management by an agent within the State. For the purposes of taxation, the intangible debt, when represented by something of a concrete nature such as a bond or mortgage, becomes in the nature of a tangible item of property at the business situs (De Ganay v. Lederer, supra; Hill v. Carter, 47 Fed. Rep. (2d) 869; Opinion of the Justices, 84 N. H. 559; Harrison v. Commissioner of Corporations and Taxations, 272 Mass. 422).

[fol. 48] The same principle applies to tangible personal property. (Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; Frick v. Pennsylvania, 268 U. S. 473; see, also, Senior v. Braden, supra.)

Maquire v. Trefry (253 U. S. 12) was at one time direct authority for holding that the income from the bonds and mortgages on real property situate in New Jersey is taxable in this State. The United States Supreme Court has, however, departed from the rule stated in that case. (Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204).

In Senior v. Braden (supra, p. 432) the court said that the views expressed in the Maguire case "are not in harmony with Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, and views now accepted here in respect of double taxation."

If the decision in the Maguire case is in conflict with the present views of the United States Supreme Court, it necessarily follows that under the decision of that court, the income from the New Jersey bonds and mortgages is not subject to the payment of an income tax in this State. In the case of Union R. T. Co. v. Kentucky (supra) it was definitely decided that a State could not tax tangible property permanently situated outside of the State or domicile of the owner and used there in the owner's business. Later the court extended the principle to intangibles in order to

eliminate unjust double taxation, stating in effect that it is no more possible for an intangible to have a legal status in two places at the same time than it was possible for a tangible to be in two places at the same time. (First Nat. Bank v. Maine, 284 U. S., 312; Baldwin v. Missouri, 281 U. S., 586; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83). [fols. 49-50] While there has been a sharp conflict among the members of the United States Supreme Court on the subject, and its earlier decisions are, in certain instances, in conflict with its later decisions, still we understand the late decisions to mean that double taxation is illegal and that the income from securities which have a taxable situs in one State cannot be legally taxed in another State. The decisions of that court are binding upon us on the questions here involved and should be strictly followed.

As the property from which the relator's income was derived had a business situs in New Jersey and was taxable there, the income therefrom cannot be taxed in this State. The order of the Appellate Division should be affirmed, with costs.

Lehman, Crouch and Finch, JJ., concur with Crane, Ch. J.; Hubbs, J., dissents in opinion, in which O'Brien and Loughran, JJ., concur.

Order granted.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 51] In Court of Appeals of New York

[fol. 52] The People, etc., ex Rel. Annie Cohn,
Respondent,

ag'st

Mark Graves & Ors., as Commissioners constituting the State Tax Commission of the State of New York, Appellants

Remittitur—July 8, 1936

Be it Remembered, That on the 13th day of April, in the year of our Lord one thousand nine hundred and thirty-six, Mark Graves and others, as commissioners, &c., the appellants in this cause, came here into the Court of Ap-

peals, by John J. Bennett, Jr., Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Annie Cohn, the respondent in said cause, afterwards appeared in said Court of Appeals by Cohn & Cohn, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Joseph M. Mesnig, of counsel for the appellants; and by Mr. Maurice Cohn, of counsel for the respondent; and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is reversed and determination of State Tax Commission affirmed, with costs in this court and in the Appellate Division.

[fol. 53] A question under the Federal Constitution was presented and necessarily passed upon by this court, viz: Is Section 359 of the Tax Law of the State of New York, as amended by Chapter 933, Laws of 1935, in so far as it imposes an income tax upon rents received by a resident of this State from real property located in a foreign State repugnant to, and violative of, any provision of the Constitution of the United States. This Court held the sections of said Tax Law herein involved to be a valid exercise of legislative power.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said order of Appellate Division be reversed and determination of State Tax Commission affirmed, with costs in this court and in the Appellate Division &c, &c, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 54] COURT OF APPEALS

Clerk's Office

Albany, July 8th, 1936.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

Clerk's certificate to foregoing paper omitted in printing.

[fol. 54½] SIR:

Take notice that the within is a copy — Remittitur duly filed and entered in the office of the Clerk of Albany County, on the 14th day of July, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address, Capitol, Albany, N. Y.

To Cohn and Cohn, Esqs., Attorney for Relator, 39 Broadway, New York, N. Y.

[fol. 55] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

[Title omitted]

ORDER ON REMITTITUR—Filed July 14, 1936

The respondents above named having appealed to the Court of Appeals from a final order of the Appellate Division, Supreme Court, Third Department, in the above entitled proceeding, entered in the office of the Clerk of Albany County on or about the 14th day of March, 1936, which said order annulled a determination of the respondent State Tax Commission made herein on or about the 12th day of September, 1935, and the said appeal having

been duly argued before the Court of Appeals, and after due deliberation had thereon the Court of Appeals having made its decision and having ordered and adjudged that the order of the Appellate Division, Supreme Court, Third Department, so appealed from be reversed and the determination of the State Tax Commission affirmed with costs in the Court of Appeals and in the Appellate Division, and [fol. 56] the Court of Appeals having certified that a question under the Federal Constitution was presented and necessarily passed upon by the Court of Appeals, viz.:

"Is Section 359 of the Tax Law of the State of New York, as amended by Chapter 933, Laws of 1935, in so far as it imposes an income tax upon rents received by a resident of this State from real property located in a foreign State repugnant to, and violative of any provision of the Constitution of the United States. This court held the sections of said Tax Law herein involved to be a valid exercise of legislative power."

and having further ordered that the proceedings and record herein be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of John J. Bennett, Jr., Attorney-General of the State of New York, attorney for the above named respondents, it is

Ordered, That the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered, That the respondents have judgment against Annie Cohn, the relator herein, for their costs and disbursements in the Court of Appeals and in the Appellate Division, to be taxed.

Gilbert V. Schenck, Justice of the Supreme Court.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 56½] SIR:

Take notice that the within is a copy of Order duly filed and entered in the office of the Clerk of Albany County, on the 14 day of July, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address, Capitol, Albany, N. Y.

To Cohn and Cohn, Esqs., Attorney- for Relator, 39 Broadway, New York, N. Y.

[fol. 57] In Supreme Court of New York, Albany County

The People of the State of New York upon the Relation of Annie Cohn, Relator,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

Judgment—Filed August 18, 1936

The respondents above named having appealed to the Court of Appeals from a final order of the Appellate Division, Supreme Court, Third Department, in the above entitled proceeding, entered in the office of the Clerk of Albany County on or about March 14, 1936, which said order annulled a determination of the respondent State Tax Commission made on or about September 12, 1935; and the Court of Appeals having ordered and adjudged that the order of the Appellate Division, Supreme Court, Third Department so appealed from be reversed and the determination of the State Tax Commission affirmed with costs in the Court of Appeals and in the Appellate Division, and having further ordered that the proceeding and record herein be remitted to the Supreme Court, there to be proceeded upon according to law;

And the remittitur of the Court of Appeals and the order thereon having been duly filed in the office of the Clerk of Albany County on July 14, 1936, and the petitioner's costs having been duly taxed on August 18, 1936, in sum of $213.31,

Now, on motion of John J. Bennett, Jr., Attorney-General, and attorney for the State Tax Commission, it is

Ordered and Adjudged that the order of the Appellate Division appealed from be and the same hereby is reversed and the determination of the State Tax Commission affirmed [fol. 58] with costs in Appellate Division and Court of Appeals, and that the respondent State Tax Commission recover from the relator herein the sum of $213.31 costs, as

taxed, and that the said State Tax Commission have execution therefor.

Judgment signed and entered this 18 day of August, 1936.

John A. Knox, Albany County Clerk.

Clerk's certificate to foregoing paper omitted in printing.

[fols. 58½-63] SIR:

Take notice that the within is a copy of Judgment duly filed and entered in the office of the Clerk of Albany County, on the 18th day of August 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for —, Office and Post Office Address, Capitol, Albany, N. Y.

To —— ——, Attorney for —.

[fol. 64] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed September 12, 1936

To the Honorable Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York:

Annie Cohn, your petitioner, who is the relator-respondent in the above entitled cause, considering herself aggrieved by the order and judgment of the Supreme Court of the State of New York, Albany County, entered upon the remittitur and the final decision of the Court of Appeals of the State of New York, handed down July 8th, 1936, in this cause, which said Court is the highest Court of the State of New York in which a decision in this suit and matter could be had, hereby prays that an appeal by your petitioner be allowed herein to the Supreme Court of the United States for the reasons specified in the assignment of errors hereinafter set forth, to the end that said order and judgment entered in this cause on the 14th day of July, 1936, and on the 18th day of August, 1936, respectively, and the decision of the said Court of Appeals, upon

which the same were entered, may be there reviewed and considered and justice done your petitioner, and that an order be made allowing such appeal, and fixing the amount [fol. 65] of bond required of the petitioner herein on such appeal, which shall operate as a supersedeas.

ASSIGNMENT OF ERRORS

The petitioner Annie Cohn assigns the following errors in the record and proceeding in the said case:

The Court of Appeals erred:

1. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon rents received by (or credited to the account of) a resident of this State from real property located in a foreign state, is not violative of or repugnant to the Fourteenth Amendment of the Constitution of the United States.

2. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon interest received by (or credited to the account of) a resident of this State from bonds and mortgages physically located in and covering real estate in the State of New Jersey, and which bonds and mortgages have a situs in the State of New Jersey, does not contravene the Fourteenth Amendment to the Federal Constitution.

3. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as the following provision thereof, i. e., "Sec. 2. This Act shall be retroactive to January first, nineteen hundred and nineteen", is not violative of or repugnant to the Constitution of the United States, and particularly the Fourteenth Amendment thereof; in failing to hold that said retroactive provision is arbitrary, unreasonable and unjust.

[fol. 66] 4. In applying the principles laid down in Pollack v. Farmers' Loan & Trust Company, 157 U. S. 429, s. c. 158 U. S. 601, to the instant case. (Said case held that an income tax is a direct tax, and that a tax on rents from real property is in substance and effect a tax upon the property itself.)

5. In reversing the Order of the Appellate Division and affirming the Determination of the State Tax Commission of the State of New York.

6. In holding that Sec. 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, does not violate the Fourteenth Amendment to the Federal Constitution, in that its operation does not constitute double or multiple state taxation.

A Review Could Have Been Had on Writ of Error Under Legislation in Force January 31, 1928

Pursuant to Rule 46 (2) of the United States Supreme Court, your petitioner shows that this case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on writ of error.

The Legislation in force conferring jurisdiction on the Supreme Court of the United States to review a judgment such as the one at bar on writ of error prior and up to January 31, 1928, follows:

The Act of Congress of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 936, effective May 13, 1925, amending and re-enacting Sec. 237 (a) of the Judicial Code (U. S. Code Annotated, Title 28, Sec. 344) provides:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be [fol. 67] had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

Prayer for Reversal

Because of the foregoing errors, your petitioner prays that the said order and judgment of the Supreme Court

of the State of New York, and that the decision of the Court of Appeals of the State of New York, upon which said order and judgment were entered, in the above-entitled cause, be reviewed by the Supreme Court of the United States and reversed and judgment rendered in favor of petitioner, with costs in all courts.

Dated: September 2nd, 1936.

David Cohn, Maurice Cohn, Counsel for Petitioner, 39 Broadway, New York, N. Y. Randolph E. Paul, Esq., Watson Washburn, Esq., Of Counsel.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 68] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 12, 1936

The relator-respondent in the above-entitled suit, having prayed for the allowance of an appeal herein to the Supreme Court of the United States, from the order and judgment of the Supreme Court of the State of New York, entered in the office of the Clerk of Albany County on July 14, 1936, and August 18, 1936, respectively, upon the remittitur and final decision of the Court of Appeals of the State of New York, handed down July 8, 1936, and having presented and filed her petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction on appeal, pursuant to the statutes of the United States and the Rules of the Supreme Court of the United States, it is

Ordered that an appeal be and the same hereby is allowed to the Supreme Court of the United States as provided by law; and it is further

Ordered that the Clerk of the Supreme Court of the State of New York, County of Albany, to which Court the record herein has been remitted, shall prepare and certify a transcript of the record, proceedings, order and judg-
[fol. 69] ment in this cause and transmit the same to the Supreme Court of the United States, so that the transcript shall reach said Court within forty days of the date of this order; and it is further

Ordered that, pending the final determination by the Supreme Court of the United States of the Appeal hereby allowed, the respondents-appellants in the above entitled cause, be, and they hereby are stayed and restrained from instituting any proceeding or bringing any action to execute, carry out or enforce the order and judgment entered herein; and it is further

Ordered that security for costs herein be fixed in the sum of Five Hundred ($500.00) dollars.

Dated September 2nd, 1936.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 70] Bond on appeal for $500.00, approved and filed September 12, 1936, omitted in printing.

[fols. 71-72] Citation, in usual form, showing service on John J. Bennett, Jr., filed September 12, 1936, omitted in printing.

[fol. 73] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed September 15, 1936

It is hereby stipulated between appellant and appellees herein, by their respective counsel, and the said counsel hereby indicate as the portions of the record to be included in the transcript herein pursuant to Rule 10 of the Rules of the Supreme Court of the United States, the following papers:

Notice of application for a writ of certiorari, Orig. Record, p. 2.

Petition for an order that a writ of certiorari issue, Orig. Record, pp. 3, 4, 5 and 6.

Schedules "A", "B", "C", "D", "E", annexed to foregoing petition, Orig. Record, pp. 7, 8, 9, 10, 11, 12, 13 and 14.

Determination, Orig. Record, pp. 15 and 16.

Order that writ of certiorari issue, Orig. Record, p. 17.

Writ of certiorari, Orig. Record, pp. 18 and 19.

Stipulation and Statement of facts, Orig. Record, pp. 20, 21, 22, 23, 24 and 25.

Return of State Tax Commission, Orig. Record, pp. 26 and 27.

[fols. 74-75] Stipulation dated October 18, 1935, Orig. Record, p. 28.

Exhibits 1, 2, 3 and 4 and 5, Orig. Record, p. 29.

Order of Annulment, Orig. Record, pp. 31 and 32.

Decision of Appellate Division, Orig. Record, p. 33.

Opinion of Hill, P. J., Orig. Record, pp. 34, 35, 36 and 37.

Notice of Appeal to Court of Appeals, Orig. Record, pp. 37 and 38.

Decision of The Court of Appeals.

Opinion of Crane, Ch. J.

Dissenting Opinion of Hubbs, J.

Remittitur of Court of Appeals.

Order of Supreme Court entered upon Remittitur.

Judgment of the Supreme Court.

Petition for appeal, assignment of errors, and prayers for reversal.

Statement as to Jurisdiction.

Order allowing the appeal.

Undertaking for costs.

Citation.

Proof of service of petition for and Order allowing appeal, assignment of errors, statement as to jurisdiction and statement directing attention to provisions of paragraph 3, Rule 12 of Rules of the United States Supreme Court.

Stipulation as to transcript of Record.

Statement directing attention to the provisions of par. 3, Rule 12 of the Revised Rules of the U. S. Supreme Court Rules.

Dated September 8th, 1936.

David Cohn, Maurice Cohn, Counsel for Appellant.
John J. Bennett, Jr., Attorney for Appellees.
Joseph N. [Signature illegible], Counsel for Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 76] SUPREME COURT OF THE UNITED STATES

NOTICE

SIR:

Please Take Notice that the within is true copy of the appellant's statement of points to be relied upon, and designation of the parts of the record to be printed.

Dated New York, N. Y., September 25, 1936.

Yours respectfully, Maurice Cohn, Counsel for Apellant, Office & P. O. Address, 39 Broadway, New York, N. Y.

To Hon. John J. Bennett, Jr., Counsel for Appellees, Department of Law, The Capitol, Albany, New York.

[fol. 77] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed September 26, 1936

Comes now the appellant in the above entitled cause and states that the points upon which she intends to rely herein are the same as the six items listed in the assignment of errors heretofore filed.

And the appellant further states that she considers that the parts of the record necessary for the consideration of this cause are all the same parts listed in the stipulation as to transcript of record heretofore filed herein and therein included as the portion of the record to be included in said transcript.

Dated, New York, N. Y., September 25, 1936.

Maurice Cohn, Counsel for Appellant.

[fol. 78] STATE OF NEW YORK,
County of New York, ss:

Maurice Cohn, being duly sworn, deposes and says:

I am over the age of 21 years; that on the 25th day of September, 1936, I served the annexed statement of points to be relied upon, and designation of the parts of the record to be printed, pursuant to paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, upon

Honorable John J. Bennett, Jr., counsel for the appellees herein, by depositing in a United States post office a copy of said statement and designation securely enclosed in a sealed and postpaid wrapper, addressed to the said Honorable John J. Bennett, Jr., at the Department of Law, the Capitol, Albany, New York.

Deponent further states that he caused the said sealed and postpaid wrapper so addressed to be sent by registered mail and that in the usual course of delivery, said statement and designation will be delivered to the said addressee on September 26th, 1936.

Maurice Cohn.

Sworn to before me this 25th day of September, 1936. Mildred E. Willner, Commissioner of Deeds. N. Y. Co. Clk's No. 97, Reg. No. 38W7. Commission expires [Date illegible], 1937.

[fol. 79] [File endorsement omitted.]

Endorsed on cover: File No. 40,944. New York Supreme Court. Term No. 404. The People of the State of New York, ex rel. Annie Cohn, appellant, vs. Mark Graves, John J. Merrill, and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York. Filed September 26, 1936. Term No. 404, O. T., 1936.